A

**PP**

**v.**

**KM (A CHILD) & ANOR**

B

HIGH COURT MALAYA, SHAH ALAM
TUAN ABANG ISKANDAR JC
[CRIMINAL APPEAL NOS: 45-7-2004; 45-174, 179 & 180-2005]
5 JANUARY 2009

C ***CRIMINAL PROCEDURE:*** *Jurisdiction of court - High Court - Criminal proceedings against child offender - Whether High Court empowered to exercise all powers exercisable under the Child Act 2001 by a Court for Children - Child Act 2001, s. 117*

D ***CRIMINAL PROCEDURE:*** *Sentence - Child offender - Appropriate orders on proof of offence - Imprisonment - Circumstances when imprisonment suitable - Whether imprisonment of child a measure of last resort - Sending child to approved school or Henry Gurney School - Circumstances when such order possible - Probation, when suitable - Child Act 2001, s. 91(1)*

E

***CRIMINAL PROCEDURE:*** *Sentence - Child offender - Sending child to approved school or Henry Gurney School - Circumstances when such order possible - Whether court ought to first consider recommendation from probation officer - Whether absence of such recommendation would indicate*

F *corrective institutions not suitable for child's welfare - Child Act 2001, ss. 67, 75, 91*

***CRIMINAL PROCEDURE:*** *Sentence - Principles of sentencing - Adult offender - Multiple serious offences arising from single incident - Public*

G *interest, demands of - Circumstances when consecutive sentences called for - Circumstances when long cumulative sentence justified*

KM, a child, was charged with an adult offender for three offences under the Penal Code, to wit: (i) kidnapping under s. 365; (ii) rape

H under s. 376 and (iii) robbery under s. 397. KM was 14-years-old when he committed the offences with his adult co-offender. The offences were committed against the same female victim. Both offenders pleaded guilty to all three offences. The High Court convicted the adult offender and recorded a finding of guilt against

I KM. The issues before the High Court concerned: (a) the assessment and imposition of the appropriate order upon KM; and (b) the assessment and imposition of the appropriate sentence upon the adult offender.

**Held:**

**(1)** By virtue of s. 117 of the Child Act 2001 ('the Act'), save for certain exceptions under ss. 96 and 97 of the Act, the High court is empowered to exercise all the powers exercisable under the Act by a court for children in respect of a child. In the instant case, KM was 14-years-old when he committed the offences and was thus a 'child' under s. 2 of the Act. (para 6)

**(2)** In the instant case, the offences committed by KM were serious offences although not 'grave' offences as defined in s. 2 of the Act. The facts of the case as admitted to by KM did not present any mitigating circumstance whatsoever in his favour, save for the fact that he was 14-years-old when he committed the offences that normally would be committed by adults. (para 7)

**(3)** An order of imprisonment to be imposed on a child ought to be a measure of last resort. If the circumstances before the court warrant an imposition of an order of imprisonment on a child offender, the court ought to act accordingly. Section 91(1) of the Act provides the court with an array of options to determine the kind of order it should make in its discretion. (para 9)

**(4)** KM ought not to be returned to his family home because from the probation reports on him, his family was not in a conducive state to provide him with an environment to flourish or live like a normal child. In the instant case, the options open to the court were those enumerated under s. 91(1)(f) and (h) of the Act, to wit: (i) send him to an approved school; (ii) send him to a Henry Gurney School; or (iii) impose upon him imprisonment. A probation order under s. 98 of the Act was not possible due to the serious nature of the offences. (paras 12 & 13)

**(5)** KM could not be sent to an approved school under s. 67 of the Act since the offences were serious in nature and there was no such recommendation by his probation officer in the probation reports submitted to court. KM would also not qualify to be sent to a Henry Gurney School under s. 75 of the Act because there was no evidence that he was not suitable to be rehabilitated in an approved school, as required under s. 75(1)(b)(iii) of the Act. There was also no such recommendation from his probation officer. The court cannot

issue an order sending a child to an approved school or to a Henry Gurney School without first perusing a probation report on the child and in the absence of such recommendation. Where there is no such recommendation from the probation officer, it would mean that the corrective institutions were not suitable in the interest of the child's welfare. (para 13)

**(6)** The circumstances in the instant case would warrant an imprisonment order upon KM. Considering the facts of the case and the role played by KM in the commission of the offences, the High Court would order a term of imprisonment for each of the three offences, until KM attained 21 years' of age. The order would take effect from his date of arrest and the imprisonment terms were to run concurrently. The court would be reluctant to make an example of KM as a reminder to others that crime does not pay. (para 14)

**(7)** With regard to the adult offender, the seriousness of the offences coupled with the circumstances as to how they were committed, the public interest demanded stern action. In the instant case, the public interest would be best served by sentencing the adult offender to: (a) 16 years' imprisonment and 5 strokes of the cane for the rape under s. 376 of the Penal Code; (b) four years' imprisonment for the kidnapping under s. 365 of the Penal Code; and (c) eight years' imprisonment and 3 strokes of the cane for the robbery under s. 397 of the Penal Code. The sentences had taken into account the offender's plea of guilty. *PP v. Teh Ah Cheng* (foll); *Sau Soo Kim v. PP* (foll). (paras 18, 19 & 20)

**(8)** The sentence of imprisonment for the rape was to take effect from the date of the offender's arrest and the imprisonment for the kidnapping was to run consecutive to the sentence for rape. The sentence of imprisonment for the robbery was to take effect at the expiry of the imprisonment for the kidnapping. The case for exercising the court's discretion in favour of a consecutive order on the imprisonment sentences was hard to resist having regard to the serious nature of the offences and to the circumstances pertaining to their commission as well as their impact on society. (paras 21, 22 & 23)

**(9)** In the instant case if the cumulative and aggregate sentence was out of the ordinary, this was because the case was not an ordinary case. Under the circumstances pertaining to the commission of the offences, the long sentence was more than

justified. The sentence imposed on the adult offender for the three offences and the order on the consecutive nature of the sentences had been passed for the purposes *inter alia*, of showing the court's utter abhorrence against the criminal conduct of the offender apart from the need to deter and to punish the offender for his actions. (paras 24 & 25)

**Case(s) referred to:**
*Amran Mohd Jin v. PP [2007] 2 CLJ 545 HC* ***(refd)***
*Annantan Subramaniam v. PP [2007] 8 CLJ 1 HC* ***(refd)***
*Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA* ***(refd)***
*Kanagasuntharam v. PP [1992] 1 SLR 81* ***(refd)***
*Marimuthu Balikrishnan v. PP [1974] 1 LNS 88 HC* ***(refd)***
*PP v. Teh Ah Cheng [1976] 1 LNS 116 HC* ***(foll)***
*PP v. Wong Kok Sein & Ors [1988] 1 LNS 33 CA* ***(refd)***
*PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC* ***(refd)***
*R v. Faulkner [1972] 56 Cr App R 594* ***(refd)***
*R v. Vaitos [1981] 4 A Crim R 238* ***(refd)***
*Regina v. MA [2004] 145 A Crim R 434* ***(refd)***
*Sau Soo Kim v. PP [1975] 1 LNS 158 FC* ***(foll)***

**Legislation referred to:**
Child Act 2001, ss. 2, 67(1)(c), 75(1)(b)(iii), 91(1)(f), (h), 96(2), (3), 97, 98(1)(b), 117
Criminal Procedure Code, s. 282(d)
Kidnapping Act 1961, ss. 3
Penal Code, ss. 365, 376, 397

**Other source(s) referred to:**
*Emmins on Sentencing*, 2nd edn, p 151

*For the prosecution - Mohd Iskandar Ahmad DPP*
*For the child offender - N Saraswathy Dewi; M/s N Saraswathy Dewi*

*Reported by Andrew Christopher Simon*

## JUDGMENT

**Tuan Abang Iskandar JC:**

**[1]** Today is for sentences to be passed on the adult offender (Civajanam) and for appropriate orders to be imposed on the child offender (KM), for commission of offences to which they had both pleaded guilty.

**[2]** Both these offenders had stood charged and were jointly tried for three offences under the Penal Code namely: s. 365 for kidnap; s. 376 for rape and s. 397 for robbery, perpetrated unto the same female victim. In respect of the kidnap offence, they were initially charged under s. 3 of the Kidnapping Act 1961 which provides, on conviction, for a possible death penalty on the adult offender. These charges had been heard in this court but in the course of trial, the learned public prosecutor in exercising his discretion had amended that charge under s. 3 of the Kidnapping Act 1961 to one under s. 365 of the Penal Code against both these offenders. Both these offenders had henceforth pleaded guilty to the newly amended kidnap charge and also to the said two other existing charges preferred against them.

**[3]** I was satisfied with their respective pleas of guilty to all the respective charges. The facts were also tendered before this court and they were admitted to as correct by both these offenders. Both the offenders had also admitted to the exhibits tendered by the learned Mr Deputy as being exhibits related to the commission of the said offences.

**[4]** Having been so satisfied, I then had proceeded to convict the adult offender namely, Civajanam a/l Subramaniam for each of the three charges preferred against him. In respect of KM, being a child, I had recorded a finding of guilt against him and did not record any conviction against him for each of the three charges to which he had pleaded guilty respectively.

**[5]** I had also heard the learned counsels in connection with their pleas in mitigation on behalf of both these offenders. Likewise, I had also heard the submissions by learned Mr Deputy on what the proper sentences and orders ought to be imposed on these two offenders under the circumstances obtaining before this court. I had given all these pleas and submissions very anxious consideration bearing in mind the very serious nature of the offences that had been perpetrated upon the victim in this case as well as the heavy penal sanctions that have been provided under the law for such transgressions.

**[6]** First, I shall deal with the child offender (KM). By virtue of s. 117 of the Child Act 2001 ('the said 2001 Act') this court, being a High Court, with the express exception relating to ss. 96 and 97 thereunder, is empowered to exercise all the powers which may be exercised under the said 2001 Act by a court for children in respect of a child. As dictated by the clear words that appear under s. 91

of the said 2001 Act, the High Court can make the appropriate orders on a child, in addition to any other powers exercisable by it by virtue of the said 2001 Act. A child shall not be 'convicted' or 'sentenced' as is usually understood and practiced in the normal criminal court dealing with adult offenders. Only 'orders made upon a finding of guilt' could be recorded against a child. KM was 14 years old when he committed these offences and for all intents and purposes, he had fulfilled the stated definition of a 'child' under s. 2 of the said 2001 Act.

**[7]** Looking at the offences which had been committed by the child offender (KM), they cannot, by any stretch of imagination be viewed as minor offences or as offences which are not serious in nature. On the contrary, they are serious, if not very serious offences although in the context of the said 2001 Act they do not come within the legal embrace of what has been defined as 'grave offences' under s. 2 therein. The circumstances in which these offences had been perpetrated only had the effect of aggravating them, instead of extenuating them. These offences took place close to midnight on the material date as stated in the charges and the trauma caused on the helpless victim continued well into the early morning the next day. A parang, which is potentially a deadly weapon, was used to threaten the said victim in the commission of these offences. The facts of the case (P17) as admitted to by this child offender speak for themselves and I need not repeat them here in extenso but suffice it is for me to say that in themselves the facts did not present any mitigating circumstance whatsoever in favour of the child offender in this case. The only saving grace, if I may be allowed to describe it as such, that had worked in favour of this offender has been the fact that he was 14 years old when he had committed these offences, offences which one normally expects would be committed by adults, if at all.

**[8]** His learned counsel Tuan Hj. Imran Hadzalie bin Abdul Hamid, had pleaded for leniency on his behalf. He had cited a few reported cases and had referred to the probation reports (P30, P31 and P32) that had been prepared by the probation officer from the Welfare Department (on request by this court) and concluded that his client had been a product of a broken family. It was also impressed upon this court that KM's infantile indiscretion could be attributed to the wrong company that he had chosen to keep. It was because of the wrong company that he had kept that he had been led astray into wayward behaviour which had culminated into offending behaviour. That offending behaviour, it was submitted by

learned counsel, had finally found its ultimate expression in the commission of these three offences by KM. From the probation reports prepared on him it is quite clear where the influence that had driven this child offender had come from. As such, according to learned counsel, the offending behaviour of this child offender has to be viewed in its proper context. The learned counsel had also submitted that his client ought not to be ordered to suffer any imprisonment term because, in his view, in the scheme of things under the said 2001 Act, an order of imprisonment against a child aged 14 years and above at the time of commission of an offence ought to be resorted to only as a last resort. Learned counsel had also submitted before this court that by pleading guilty, the child offender had saved much judicial time and inconvenience to witnesses and had saved public expense as a result. In the main, learned counsel had urged this court not to impose an order of imprisonment on this child offender but rather to consider sending him to either an approved school or to a Henry Gurney School, institutions established under the said 2001 Act.

**[9]** With respect, I agree with the learned counsel that an order of imprisonment to be imposed on a child ought to be taken as a measure of last resort. This sentiment has found statutory expression under s. 96(2) of the said 2001 Act, as follows: "A child aged fourteen years and above shall not be ordered to be imprisoned if he can suitably dealt with in any way whether by probation, or fine, or being sent to a place of detention or an approved school, or a Henry Gurney School, or otherwise." As an added precaution so that a child so ordered to be imprisoned will not become readily and adversely influenced by adult prisoners, sub-s. (3) of s. 96 of the said 2001 Act clearly stipulated that such a child shall not be allowed to associate with adult prisoners. But be that as it may, such an order remains an option legally provided under the said 2001 Act, which is open to the court to invoke if the peculiar circumstances in the case before it so warrant. And it is my considered view therefore that if the circumstances before the court should warrant an imposition of an order of imprisonment on a child offender, then the court ought to act accordingly. So, while an order of imprisonment is definitely not served on the typical and routine menu on a child offender's plate at the end of the court's proceedings, nevertheless exceptional occasions may justify an inclusion of such an item to the menu of a child offender. In that sense, s. 91(1) of the said 2001 Act does provide for an array of possible options from which the court may make an appropriate order depending on the facts and circumstances of the case before

it. Section 91 of the said 2001 Act can be described as being both a 'welfare-driven' as well as a 'justice-driven' piece of legislation and it is left to the wisdom of the court in the proper exercise of its discretion, to determine what kind of an order or orders ought to be made to meet the demands created by the circumstances of the case before it, bearing in mind always the twin purpose of ensuring that both the interests that impact on the welfare of the child offender and those impacting on the just expectation of society are duly considered and are sufficiently achieved.

**[10]** The learned Mr. Deputy, En Mohd. Iskandar bin Ahmad, while recognizing that KM was a child when he committed these offences, on the other hand had submitted that, in a case such as the one before this court now required that KM be treated by this court as an adult offender and thus be dealt with as such an offender bearing in mind the role he had played in commission of these offences. He had cited before this court the case of *PP v. Teh Ah Cheng* [1976] 1 LNS 116 where the learned Justice Abdoolcader J in the context of the facts of the case before him had said as follows: "(3) If a person is not too young to have in his possession and to handle firearms and does so unlawfully then he is certainly not too young to suffer the penalties therefor prescribed by law." On that note, the learned Mr. Deputy had urged this court to invoke the imprisonment order provisions against this child under s. 91(1)(h) of the said 2001 Act.

**[11]** The learned counsel Tuan Haji Imran Hadzalie had said KM was a child when he committed these serious offences. He was 14 years old then and that he ought to be treated as one. There exists no doubt about his age but, the facts of the case have shown clearly the roles that he had played. They are by no means trivial or minor. To trivialize his roles in the incident would only serve to diminish the untold sufferings wrought upon the victim. Indeed, as I had said earlier, the kinds of offences committed by KM, this child offender are not those which would normally be committed by his peers or those in his age group.

**[12]** So, how should this court deal with this child offender having regard to the circumstances obtaining before me? It would be irresponsible to order that this child offender before me be immediately released from custody and be allowed to roam freely on our streets just like that. In dealing with a child offender, while ensuring that society will not be at unnecessary risk to his indiscretions, the court ought to ensure, wherever possible and within the bounds permitted by law, that the child's well-being in

terms of maximizing healthy development in what remains of his formative years be fully utilized. This to my mind is critical so that he can reenter the community as an adult with some practical skills to usefully reintegrate into society. But from a perusal of the probation reports (P30, P31 and P32) prepared on him, it is clear to me that this child offender ought not to be returned to his family home because his family home as could be deduced from those probation reports, is definitely not in a conducive state to provide this child offender with the necessary environment wherein which he can flourish, or at least learn to live a life of a normal child. He needs to be taught useful living skills and tight discipline so that he may be able to see life in a different light and realize the utter uselessness and futility of associating with less than savoury characters as he did in the past, and upon whom the cause of and reason for his indiscretions had been attributed to.

**[13]** I have been looking at the array of possible options open to me under s. 91(1) of the said 2001 Act before deciding on the most appropriate order as envisaged under the said 2001 Act. Having done that, in the light of the circumstances pertaining to the commission of the of the three offences and having regard to the circumstances surrounding the child himself and having regard to his counsels plea and the probation officer's reports (P30, P31 and P32), I have narrowed down those options to those enumerated under sub-ss. (1)(f) and (1)(h) of s. 91 of the said 2001 Act. In other words, I am looking at the possibility of sending him either to an approved school or to a Henry Gurney School, or to impose on him imprisonment terms. I found that no probation order under s. 98 of the said 2001 Act could be issued in this case because of the nature of the offences which this child offender had committed. Looking at the stated criteria for sending a child to an approved school under s. 67 of the said 2001 Act, it would appear that this child cannot be sent to such a school for two reasons, namely, (i) the offences which had been committed by this child have been serious in nature (as opposed to the term used, 'although not serious in nature') and (ii) that there was no such recommendation having been made by the probation officer in his reports as submitted by him in this court. Likewise, it would appear that this child also would not qualify to be sent to the Henry Gurney School under s. 75 of the said 2001 Act because there has been no evidence led in this court that he was not suitable to be rehabilitated in an approved school which is a stated requirement under sub-s. (1)(b)(iii) of s. 75 of the said 2001 Act, and again there was no such recommendation in either P30, P31 or P32. (the

probation reports) emanating from the probation officer. As such, it would appear that the circumstances pertaining to this child offender have unwittingly or otherwise, taken him out of the equation in so far as issuing a probation order on him, or sending him to an approved school or sending him to a Henry Gurney School, is concerned. An order for probation under s. 98 of the said 2001 Act specifies the offences by way of listing down those offences whose commission thereof would disqualify a child from consideration there under. The listed disqualifying offences include rape among others (s. 98(1)(b). A child can be sent to an approved school under s. 67 if he has committed an offence which although not serious in nature, 'but if it is expedient that the child be subject to detention for such a term and under such instruction and discipline as appears most conducive to his reformation' and that there is a recommendation from the probation officer to that effect. (s. 67(1)(c)). In other words, an approved school is an institution meant for a recalcitrant petty crime child offender who needs regimented corrective programme while being detained under such order. A child can be sent to a Henry Gurney School under s. 75 of the said 2001 Act, if an approved school does not suit his behavioural needs and habits, and if the court is of the view that because of the child's criminal habits and tendencies, it is expedient that the child be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime. Of course there must be a recommendation by the probation officer to that effect. So it can be gathered that Henry Gurney School is meant for hardened child offenders whose criminal records would speak impressively but in a negative way. As is clearly spelt out under s. 75 of the said 2001 Act, a child sent to a Henry Gurney School would be subject to 'such instruction and discipline as appears most conducive to his reformation and the repression of crime.' The probation reports on this child before me do not present such a completely bleak depiction of this child offender and neither do they recommend that the child be sent to an approved school or to a Henry Gurney School. Indeed the probation officer had specially mentioned in his reports that the child offender had a natural liking for drawing and that he had been missing his family members especially his mother. From my reading of the provisions under ss. 67 and 75 of the said 2001 Act, once the probation officer makes a recommendation to send a child either to an approved school or to a Henry Gurney School, the court has to oblige and make the necessary order accordingly. Actually, those would appear to be the only avenues at the disposal of the court when it is minded to order a child either

to an approved school or to a Henry Gurney School. Such an order must be preceded with a consideration and perusal of a probation report prepared on the child and the probation officer has to so recommend before the court can issue such an order. As such, the enabling and empowering provisions under s. 91(1)(f) of the said 2001 Act must be read in tandem with the provisions as contained under ss. 67 and 75 of the said 2001 Act. In other words, a court cannot issue either an order purporting to send a child to an approved school or to a Henry Gurney School without the benefit of first perusing a probation report prepared on the child and in the absence of such recommendation by the probation officer in the said report. The absence of such recommendation emanating from the probation officer must of necessity be interpreted to mean that such corrective institutions are not suitable in the interest of the child's welfare. Therefore prudence would dictate that the court ought not issue any order under s. 91(1)(f) of the said 2001 Act entirely on its own volition without the critical inputs coming from the probation officer regarding the suitability of resorting to such a course of action. In this case before me, this child (KM) had committed offences which are serious in nature but at the same time, he has not been identified or profiled as a hardened child criminal To be fair to the probation officer concerned, he had not detected all those stipulated characteristics as listed under s. 75(1) of the said 2001 Act which would have warranted him to make the appropriate recommendations under the same section. In my view, the probation officer was entirely correct in his approach and conclusion with respect to the probation reports which he had prepared, when he was silent on the recommendation relating to orders under ss. 67 and 75 of the said 2001 Act. For that reason, this child before this court today has found himself in a position where he could not be sent to either of the corrective institutions. He had committed serious offences, thus disqualifying him from being sent to an approved school, but neither has he fitted into the profile of a hardened child offender with known criminal tendencies, such that he ought to find refuge and salvation at a Henry Gurney School. In biblical metaphor, he could be likened to be in purgatory of some sort.

**[14]** Having so found, therefore it would appear to me that this court is only left with the option of ordering the imposition of imprisonment terms on this child offender for the three offences that he had committed. As earlier identified, the relevant provisions to look at reside under s. 91(1)(h) of the said 2001 Act. Admittedly, it is not a common occurrence that a court would order

a child to imprisonment terms. In the context of the said 2001 Act, an invocation of such provision would be rare but nevertheless not totally alien and such an invocation would best be described as an exception rather that the rule. But the circumstances in this case would appear to warrant such an invocation of the imprisonment order on this child offender because the other options previously thought to be applicable to him could not be so harnessed for reasons as explained by me in the foregoing paragraphs in this judgment. Indeed, this option is the last resort open to this court. The punishments for convicted rapists in this country have been consistent. Longish custodial sentences and lashes of the rotan appear to be the typical sentence in deserving cases. Similarly, the courts have also been consistent with imposition of custodial sentences for offences of kidnap and armed robbery under the Penal Code. Having considered the facts of this case and the role played by this child in the commission of the three offences, I hereby order him to a term of imprisonment for each of the three offences until he reaches the age of twenty one with effect from his date of arrest. These sentences are to run concurrently. The regime as could be gathered from the provisions under the said 2001 Act clearly appears to be 'child-centric' in that his welfare as far as possible ought to be given preeminence when considering the appropriate order to be imposed on a wayward child. And generally speaking, it would not be in keeping with that realization that a child once imposed with an order by the court, upon a recording of guilt on his own plea, ought to be made to hang and dry, for all and sundry to see on the pretext that he be treated as a reminder that crime does not pay. Indeed Justice Strong in the unreported case emanating from the county court in the State of Victoria in Australia dated 22 February 2008 had aptly observed as follows: "Generally courts are reluctant to make an example of those under a disability, and children are so regarded." So was KM who, when he committed these dastardly offences, he was 14 years old.

**[15]** The provisions under s. 96(3) of the said 2001 Act shall also kick in. I trust that he will be given some kind of education while in prison so that when he is finally released therefrom, he will be in a position such that he can live a normal person's life and be able to contribute to society in a positive way.

**[16]** I shall now deal with the adult offender Civajanam a/l Subramaniam. I have heard and considered the submissions on his plea for mitigation which had been ably articulated by his learned counsels Puan Sri Saraswathy Dewi and Cik R Alegendra before this

court. Together they had urged this court to impose lenient sentences on this offender taking into account his age at time of offence, that he had drunk whiskey before the incident and therefore he had acted recklessly and that he had pleaded guilty to all the three charges at the earliest opportunity when the original charge under s. 3 of the Kidnapping Act 1961 was amended to one under s. 365 of the Penal Code. It was also pleaded on his behalf that he was illiterate and had kept bad company.

**[17]** Looking at the facts of the case which were admitted to by this offender, he had used a deadly weapon (the parang) when committing the offence of rape on the victim. The parang was at the material time pointed to the neck of the victim. I cannot see how the facts surrounding the offence of rape can in any way provide any legitimate ground for this court to show leniency to the offender. Neither have I been impressed by the alleged fact as submitted by learned counsel on his behalf, that the offender had drunk whiskey before he committed these offences as thereby justifying for his lack of accountability for his criminal conduct. If at all, it must be shown that he had been forced to drink the whiskey and as a result of which he had become drunk and began his so-called reckless spree. There was no such evidence in the facts of this case before this court (P17) and neither was such evidence offered on behalf of this offender, apart from saying that there was a whiskey bottle found in this offender's car and therefore by virtue of the presence of such bottle he must be deemed to be drunk when he committed these offences.

**[18]** I agree with the learned Mr Deputy that all the three offences of rape, abduction/kidnap and robbery are serious offences and coupled with the circumstances as to how they were committed in this case, public interest would demand stern action coming from this court, and to my mind, such expectation coming from society in this case as echoed by the learned Mr Deputy, was fully justified. Indeed, in the case of *Teh Ah Cheng (supra)* the learned Justice Abdoolcader had occasion to say and I quote: "The courts may not perhaps have to wholly reflect public opinion but they certainly must not be indifferent or disregard it, and it must be made abundantly clear that in the light of the appalling increase in crimes involving violence and the unlawful possession and use of lethal weapons, society is crying out 'enough is enough' and is no longer in any mood to tolerate such offenders who like serpents in the front lawn of justice disrupt law and order. So be it clearly made known that the forces of justice will be vigorously brought to bear

upon these engineers of evil who must be made to realize that if they indulge in violence or arm themselves with weapons of violence they will lose their liberty if nothing else ..." How eerily relevant still are those words, uttered by the learned Justice Abdoolcader over 30 years ago, in describing the very same woes which our society is presently suffering today.

**[19]** At the end of the day, it is left to the sentencing judge, in properly exercising his discretion by taking into account the principles on sentencing to finally mete out appropriate justice on this offender. At the outset, let me be clear. This case involving this offender does not merit any consideration for any release on bond of good behaviour. With respect to imprisonment terms to be imposed, our Parliament had in its wisdom provided a range of punishments for each of the three offences within which this court, like any other courts in this country, can decide on the sentences it deems appropriate having regard to the circumstances obtaining before it. Suffice for me to say that the facts and circumstances in this case called for very stern but appropriate punishments coming from this court.

**[20]** So in coming to the appropriate sentences with respect to the three offences, after taking into all the relevant factors and the principles on sentencing, it is my view that public interest must take precedence over the individual interest of this offender. Indeed, the current trend on sentencing for these kinds of offences, in particular sexual offences, has been imposition of longish terms of imprisonment and lashings of the rotan on the offenders. (see the cases of *Annantan Subramaniam v. PP* [2007] 8 CLJ 1; *Amran Mohd Jin v. PP* [2007] 2 CLJ 545; *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572) The wider dictates of public interest consideration must invariably supersede the narrower consideration of the offenders' individual interests. The wider dictates of public interest consideration must invariably supersede the narrower consideration of the offenders' individual interests. In that sense, whatever form the sentence that the court imposes, it must ensure, unless in exceptional circumstances, that the intended sentence must serve the superior public purpose. Reverting to this case before me, I do not believe that the facts and circumstances surrounding the commission of these offences in this case, have presented this court with any window of opportunity to depart from such trend on sentencing. Only the quantum of the sentence would need to be decided upon. With that in mind and in the context of this case, it is my considered opinion that public interest will be best served

by this court imposing on this offender an imprisonment term of 16 years (out of maximum 20 years) and five strokes of the rotan for the offence of rape under s. 376 of the Penal Code; a term of Four years imprisonment (out of maximum seven years) for the offence of abducting/kidnapping under s. 365 of the same Code; and a term of imprisonment for eight years (out of maximum 14 years) and three strokes of the rotan for the offence of armed robbery under s. 397 of the same Code. Clearly therefore this offender has been given a discount for having pleaded guilty to all the offences. In so doing, I have been mindful of what the learned Chief Justice Lee Hun Hoe had said in the case of *Sau Soo Kim v. PP* [1975] 1 LNS 158 that even a hardened criminal ought to be given a discount in terms of duration of sentence for having pleaded guilty. Its value in the general administration of criminal justice cannot be understated. But having said that, I do not believe, even for a moment, that the sentences imposed on this offender had been lenient in any sense of the word.

**[21]** As regards the dates of the taking into effect of these three sentences on this offender Civajanam, I order that the sentence of imprisonment for the offence of rape (16 years) to take effect from the date of his arrest and that the sentence of imprisonment for offence for kidnap (4 years) to run after this offender has served his sentence of imprisonment for rape. His sentence of imprisonment (8 years) for the offence of armed robbery shall take effect at the expiry of this imprisonment sentence for the offence of kidnap. I am fully aware that the matter of ordering the sentences to run either concurrently or consecutively resides within the realm of the sentencing judge's discretion, bearing in mind the circumstances before it. Under normal circumstances if the various offences were committed in one same transaction then the court should order that the sentences to run concurrently. Cases had been cited before me where the sentences for offences of kidnap and extortion having been committed in one transaction had been ordered to run concurrently, as seen in the Hong Kong case of *PP v. Wong Kok Sein & Ors* [1988] 1 LNS 33, as was the case involving the offences of rape and robbery as was decided in the case of *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645. Yet again in the case of *Marimuthu Balikrishnan v. PP* [1974] 1 LNS 88, Chief Justice Wee Chong Jin refused to disturb the Senior District Judge's order that the sentences for the two offences ostensibly committed in one transaction, to run consecutively. In that case, the accused person was ensnared in a sting operation whereby he had taken a pistol and five rounds of ammunitions from behind his TV set in

his house for the purpose of selling them to the complainant, who unbeknown to the accused person was an 'agent provocateur' in the case. The accused's counsel had sought to impress upon the learned Chief Justice that as the gun and the five rounds of ammunitions were kept at the same place, it ought to constitute one offence and that the sentences should be ordered to run concurrently. To my mind, among all the cases cited above on the issue of concurrent *vis-a-vis* consecutive sentence, the facts in the *Marimuthu*'s case *(supra)* would appear to have presented strongest case justifying a concurrent sentence but yet the learned Chief Justice ruled in favour of preserving and affirming the order of the District Court judge that sentences imposed on the appellant ought to run consecutively.

**[22]** Having said that, the orders in those cases were made pursuant to the peculiar judge's exercise of discretion on sentence. Section 282(d) of our Criminal Procedure Code has given the sentencing judge the discretion in determining when the sentence(s) that has been passed by him or her should take effect, although as a general rule a sentence, in the absence of any order made otherwise, shall run from the date such sentence is passed by the court. In deciding whether to order the sentence(s) to run concurrently or otherwise, the court may consider the one transaction principle which essentially stipulates that sentences imposed for offences committed in one transaction should ordinarily be ordered to run concurrently. It would be pertinent to pause for a moment and to reflect on the court's decision in the *Yap*'s case *(supra)* where the learned judge there had said that in cases where the offender had been convicted of principal and subsidiary offences, then the sentences should be made to run concurrently. In all honesty and humility, I cannot see much utility in categorizing offences that occurred in one transaction into principal and subsidiary offences. I am of that view, because in a case such as the one before me, where would one begin to determine which of the three offences ought to be the principal offence and which ought to be categorized as subsidiary offence(s)? Such categorization to my mind would invariably have the effect, although this may not be intentional, of attaching some kind of value to those offences under consideration and in all fairness, in the absence of clear and objective criteria to be applied across the board, such an exercise may well become arbitrary and may cause injustice especially to the victim who had suffered the full brunt of the ill-effects of the perpetrator's multiple offences that had been visited upon her. All the three offences committed by this offender are serious and are distinct offences in themselves. Just because a rape was committed

in the course of an offence of kidnap should not in itself be a ground to order that sentences meted out for the two distinct offences ought to run concurrently. Could or rather should the offence of rape be a subsidiary offence to the offence of kidnap? Whatever their permutations, the consequential and eventual concurrent punishments will be severely compromised or diminished. These offences that had been perpetrated by this offender are heinous crimes in themselves and by ordering sentences passed in respect of them to run concurrently would, to my mind, do severe injustice to the victim who had suffered two distinct criminal conduct perpetrated on her by the offender and yet the offender would, in effect, suffer the pain of penal sanction for only one offence. In so doing, society's legitimate expectations could hardly have been fulfilled.

**[23]** In fact, the learned Justices of the Court of Appeal, in the case of *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572 had observed that the 'one transaction rule' was not an absolute rule. Justice Augustine Paul JCA (as he then was) cited with approval the speech by Chief Justice Yong Pung How of Singapore in the case of *Kanagasuntharam v. PP* [1992] 1 SLR 81 at p. 83, where the learned Chief Justice had said "The English courts have recognized that there are situations where consecutive sentences are necessary to discourage the types of criminal conduct being punished; see *R v. Faulkner* [1972] 56 Cr App R 594 ..." Indeed, I have found this approach to be more flexible as well as just, as clearly, its exercise one way or the other, is driven by the prevailing circumstances in connection with the particular case before the court. As had been observed in the *Faulkner*'s case *(supra)* its utility can be clearly seen where a court's decision on the ultimate order on whether the sentences imposed ought to run concurrently or consecutively, has been motivated by the dire need felt by the court, to discourage the types of criminal conduct that was being punished. To my mind that approach is a useful option open to the court in dealing with this kind of situation relating to concurrent *vis-a-vis* consecutive sentence issue. This is because the sentencing court, at that stage of the proceedings, will have already been able to appraise the significance or otherwise of the offences in terms of the overall immediate impact that they may have on the well-being of society, before so deciding one way or the other. In this case before me, the kinds of offences that are being dealt now are definitely those kinds of offences that any reasonable person, in his or her right mind, would certainly want to discourage and if possible, to have totally eradicated from our society. Thus the case for exercising this court's

discretion in favour of a consecutive order on the sentences with respect to the three imprisonment terms is hard to resist or to dislodge, having regard as it were, to the serious nature of the offences and to the circumstances pertaining to their commission as well as its impact on our society.

**[24]** I am also totally aware of the effect of the totality principle with respect to the consecutive sentences on cumulative imprisonment terms imposed on this offender. According to the totality principle, it is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour. (see *Emmins on Sentencing* (2nd edn) p. 151.) When one talks of the totality principle, one ought to be conscious about the concerns that had been voiced out about the 'crushing effect' such abnormally longish sentence would have on the offender's hope of rehabilitation and a return to a desirable life. In the case of *R v. Vaitos* [1981] 4 A Crim R 238 Justice O'Bryan was faced with the same predicament when he had to decide an appeal that had involved the same issue and this is what the learned judge had said at p. 301 therein: "I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour." In the case before me, the facts as admitted to by the offender revealed that the victim had been made to suffer everything a woman could possibly suffer at the hands of a total stranger with dubious and devious criminal intent. She had lost her modesty, not to mention the mental agony and fear which she had to endure while in wrongful and illegal confinement of the offender and his co-offender. She was brought to a dark and secluded place in the middle of the night, where the offender had taken liberty with her body and had forced himself into her against her will. To top it all a deadly weapon of violence was threatened to be used on her when these offences were perpetrated on her. If the cumulative and aggregate sentence was indeed out of the ordinary, this is because this has not been an ordinary case and under the circumstances pertaining to the commission of these offences, such longish sentence to my mind,

is more than justified. From the facts of this case, it has become quite apparent to me that the 'accident' was deliberately induced or created by the offender so that he could blame the victim for having knocked his car from behind and then hoping that he could get quick compensation from his unknowing victim. The *modus operandi* was crude and cunning but could prove to be efficient if perpetrated upon unwitting victims, as it had proved to be in this case. If the *actus reus* had been crude, it's accompanying *mens rea* was entirely diabolical. If the offender had really only wanted to get compensation from the father of the victim, why did he not just bring the victim to her father's house to claim the compensation, for after all the house was located only about 1 kilometre from where the 'accident' had taken place. But instead, he had abducted her into his car and robbed and raped her at knifepoint. While it may be true as submitted by learned counsel, that the offender was not looking for a prey to rape that night, nevertheless as had been borne out by the facts, having found one, he did not resist his urge to rape her having first abducted her and robbed her. The chemist report (P19) had certified that the DNA profile developed from the sample on the swab taken from the private part of the victim had matched with the DNA profile developed from the blood sample taken from this offender. As such there had been penetration of his penis into the private part of the victim. The offender was a stranger to the victim and she had not consented to have sexual intercourse with this offender. Under the circumstances it would be an uphill task for this offender to convince this court, had he claimed trial, that he had a plausible defence. The facts relating to the other two offences are also clearly and equally incriminating. Indeed, it has been held by our criminal courts that in a case where an accused person had pleaded guilty to a charge to which there could possibly be no plausible defence, such a plea of guilty ought not to be given much value in terms of considering whether the court ought to be lenient with him.

**[25]** The list that could be drawn up to record for posterity, the numerous purposes of sentencing may well be long and in that list the following purposes must find their rightful places, namely, to ensure that the offender is adequately punished for the offence; to prevent crime by deterring the offender and others from committing similar offences; to protect the community from the offender; to make the offender accountable for his or her actions; to denounce the conduct of the offender; to recognize the harm done to the victim of the crime and the community In appropriate cases, a sentence is passed to rehabilitate the offender (see *Regina v. MA*

[2004] 145 A Crim R 434.). The sentences which I have imposed on this offender Civajanam for the three offences and my order on the consecutive nature of the said sentences have been so passed for the purposes *inter alia*, of showing this court's utter abhorrence against the criminal conduct of this offender apart from the need to deter and to punish offender for his actions. They have also been couched upon the need to provide an assurance to the members of society, especially to the victim of these crimes and those similarly situated, that the forces of justice will be unleashed and be visited upon the engineers of criminal acts commensurate with the harm that they have done. The behaviour of the offender, to my mind poses a clear and present danger to female members of society against which they deserve constant protection. This court could, and should afford that protection to society, from such a menace by meting out longish custodial sentences such as those imposed on this offender.

**[26]** I am constantly reminded of the words of Justice Abdoolcader when the learned judge was passing sentence on the accused Teh Ah Cheng, which to my mind, could be applicable, *mutatis mutandis*, to both offenders in this case before me. As such, I now wish to quote his very words: "... and I trust that, if it is indeed true as he alleges that he was misled by his friend, whatever that means, the clanging of the prison gates ... behind him will afford the respondent ample opportunity to ponder on his folly in the company he keeps, and give to others of his ilk and equally gullible, cause to reflect on the desirability of the company they should or rather should not keep, for, as the ancient adage goes, he who sups with the devil must use a long spoon."

**[27]** I order the offending exhibits to be disposed of according to law.

**[28]** Before I leave this case, let it known too that the orders of imprisonment imposed on the child offender and sentences imposed on the adult offender are no reflection whatsoever on the efforts put into both the offenders' cases by all the learned counsels, who together with the learned Mr Deputy had conducted themselves professionally, both as officers of the court in assisting this court in coming to a proper decision as well as in the discharge of their arduous duty of representing their clients' interests before me. The facts of this case have simply presented an insurmountable hill to climb in so far as the counsels are concerned.